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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

HUE NAY,

Defendant and Appellant.

F076949

(Super. Ct. No. BF111162A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. John S. Somers, Judge.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Robert K. Gezi, Darren Indermill and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Meehan, Acting P.J., Snauffer, J. and DeSantos, J.

Appellant challenges enhancements imposed pursuant to Penal Code sections 12022.5 (former § 12022.5 subd. (a)(1)) and 186.22.<sup>1</sup> Respondent concedes that appellant's challenges are meritorious but argues that a remand is unnecessary.

### **FACTUAL AND PROCEDURAL HISTORY**

The pertinent portions of the opinion in appellant's appeal in *People v. Nay* (Oct. 25, 2007, F051375) [nonpub. opn.], state as follows:

“Defendant Hue Nay shot a teenage boy in the hand. [¶] ... [¶]

“The district attorney filed a four-count information. Count one was assault with a firearm. ([ ], § 245, subd. (a)(2).) Count two was discharging a firearm at an inhabited dwelling. (§ 246.) Count three was being a felon in possession of a firearm. (§ 12021, subd. (a)(1).) Count four was active participation in a criminal street gang. (§ 186.22, subd. (a).) For sentence enhancement purposes, the information also alleged that defendant personally used a firearm (§ 12022.5, subd. (a)(1)) in committing the offense set forth in count one; acted for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)) in committing the offenses set forth in counts one, two and three; and served a prior prison term (§ 667.5, subd. (b)). [¶] ... [¶]

“The jury found defendant guilty of counts one (assault with a firearm), three (being a felon in possession of a firearm), and four (being an active participant in a criminal street gang), and found the firearm-use and gang-relatedness allegations true. It found defendant not guilty of count two (discharging a firearm at an inhabited dwelling). The court dismissed the prior-prison-term allegation at the People's request.

“The court sentenced defendant to 24 years in prison. This consisted of the upper term of four years for count one (§ 245, subd. (a)(2)), plus 10 years for the gang-relatedness enhancement (§ 186.22, subd. (b)(1)) and 10 years for the firearm-use enhancement (§ 12022.5, subd. (a)(1). Upper terms for counts three and four were imposed and stayed pursuant to section 654.”

This court affirmed the judgment in *People v. Nay* (Oct. 25, 2007, F051375) [nonpub. opn.].

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<sup>1</sup> All statutory references are to the Penal Code.

On May 30, 2017, appellant filed a petition for writ of habeas corpus in the superior court. On August 11, 2017, the court issued an order to show cause why appellant's case should not be remanded for resentencing. The People did not oppose granting the relief requested. "On November 9, 2017, the court granted appellant's petition for writ of habeas corpus and remanded the case to the criminal court for resentencing."

On December 19, 2017, the court resentenced appellant to a prison term of 18 years which consisted of the upper term of four years on the assault with a firearm conviction (§ 245, subd. (a)(2)), plus an additional 10 years for the firearm enhancement (§ 12022.5, subd. (a)(1)) and an additional four years for the gang enhancement (§ 186.22, subd. (b)(1)(A)).

On January 23, 2018, appellant filed a timely notice of appeal.

## **DISCUSSION**

### **I. The Enhancement Imposed Pursuant to Section 12022.5**

On October 11, 2017, the Governor approved Senate Bill No. 620, (SB No. 620) which went into effect on January 1, 2018. (Stats. 2017, ch. 682, §§ 1-2.) This bill amends sections 12022.5 and 12022.53, to allow the trial court discretion to dismiss a firearm enhancement imposed pursuant to those sections. (§§ 12022.5, subd. (c); 12022.53, subd. (h).) Prior to this amendment, former section 12022.5, subdivision (c), provided that "the court shall not strike an allegation under this section or a finding bringing a person within the provisions of this section."

Respondent concedes that the amendment to section 12022.5 is retroactive to nonfinal judgments and should be applied to appellant.

Absent evidence to the contrary, it is presumed the Legislature intended an amended statute reducing the punishment for a criminal offense to apply retroactively to defendants such as appellant whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740,

745.) Because there is no indication that the recent amendment to section 12022.5 was intended to operate prospectively only, respondent is correct in that SB No. 620 applies to appellant.

Appellant argues that this matter should be remanded to allow the trial court to exercise its discretion to strike the firearm enhancement imposed pursuant to section 12022.5.

Relying upon *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*), respondent argues that a remand is inappropriate because in sentencing appellant, “the superior court made clear that it would not strike the personal use of a firearm enhancement (§ 12022.5, subd. (a)(1)) even if it had discretion to do so.” Respondent argues the court commented on the serious nature of the offense committed:

“[T]his is a serious offense that involves basically the use of a firearm to a—clearly it is a situation where the offense was committed for the benefit of a criminal street gang, in addition to the firearm being used, serious bodily injury. Serious injury was suffered by the victim in this matter.”

The court found no circumstances in mitigation, and found the following circumstances in aggravation:

“[The court finds] ... that the crime involved great violence and great bodily harm as demonstrated by the evidence presented at trial.”

The court noted that appellant had a “significant criminal history dating back to 1993 prior to the commission of this offense” and that appellant’s previous performance on probation was unsatisfactory because he committed the current offense when he was on misdemeanor probation. Respondent argues:

“The court then imposed the maximum sentence possible. [¶] Remand to allow the superior court to exercise its discretion to strike the section 12022.5 enhancement is pointless here.”

The general standard for assessing when a remand is required for the trial court to exercise sentencing discretion has been articulated as follows:

“ ‘[W]hen the record shows that the trial court proceeded with sentencing on the ... assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.] Defendants are entitled to “sentencing decisions made in the exercise of the ‘informed discretion’ of the sentencing court,” and a court that is unaware of its discretionary authority cannot exercise its informed discretion.’ [Citation.] But if “the record shows that the trial court would not have exercised its discretion even if it believed it could do so, then remand would be an idle act and is not required.” ’ ’ ” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

The above quoted summary by respondent of the sentencing court’s findings were made on the issue of the overall sentence that was appropriate under the laws in effect at that time. However, those findings do not unambiguously establish what the superior court would have done if it had had discretion to strike the firearm enhancement. The court did not specifically mention the firearm enhancement or how it related to the sentence as a whole or to appellant. The trial court stated that appellant’s criminal history, while significant, was “certainly not the worst [the court had] seen” and “most of the [prior] offenses [were] relatively minor.”

In *Gutierrez*, the sentencing court expressly addressed the issue of whether there was “any good cause to strike” the prior conviction at issue and “a lot of reasons not to” in concluding that the defendant was “the kind of individual the law was intended to keep off the street as long as possible.” (*Gutierrez, supra*, 48 Cal.App.4th at p. 1896.) No comparable considerations were articulated when appellant was resentenced in December 2017.

While we offer no position on what the trial court should decide when exercising its newfound discretion under SB No. 620, we conclude that the trial court should be provided the opportunity to exercise that discretion.

## **II. The Enhancement Imposed Pursuant to Section 186.22, Subdivision (b)(1)(A).**

Appellant argues that *People v. Francis* (2017) 16 Cal.App.5th 876 (*Francis*), requires that this enhancement should be modified to be an enhancement under section 186.22, subdivision (b)(1)(C), which should then be stayed.

Respondent concedes:

“In light of *People v. Francis* (2017) 16 Cal.App.5th 876 (*Francis*), [sic] respondent concedes that the court lacked jurisdiction to impose the section 186.22, subdivision (b)(1)(A) enhancement. [¶] ... [¶]

“As in *Francis*, because the superior court imposed the maximum sentence possible here, this matter need not be remanded for resentencing. This Court should simply modify the sentence to reflect a section 186.22, subdivision (b)(1)(C), enhancement on count 1 and the section 186.22, subdivision (b)(1)(C) enhancement is stayed. (See *Francis, supra*, 16 Cal.App.5th at pp. 887-888.)”

However, *Francis* expressly directed the superior court to file an amended abstract of judgment. Because this court must also direct the trial court to file an amended abstract of judgment and this case must be remanded in any event to allow the trial court to exercise its discretion under section 12022.5, in the interest of judicial economy the enhancement pursuant to section 186.22, subdivision (b)(1)(A), should also be remanded for appropriate disposition consistent with respondent’s concession.

### **DISPOSITION**

The matter of the enhancement imposed pursuant to Penal Code section 186.22, subdivision (b)(1)(A), is remanded to the trial court for a disposition consistent with the respondent’s concession. The matter of the enhancement imposed pursuant to Penal Code section 12022.5, is remanded to the trial court for the court to consider whether to exercise its discretion to strike the enhancement imposed pursuant to Penal Code section 12022.5, subdivision (c), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 1). The trial court is directed to prepare and file an amended abstract of

judgment incorporating its disposition in the above matters and to forward a copy of the abstract of judgment to the appropriate authorities. As modified, the judgment is affirmed.